

Lam (Migration) [2020] AATA 5531 (12 November 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Thi Sen Lam
VISA APPLICANT:	Mr Trung Truong Nguyen
CASE NUMBER:	1803457
DIBP REFERENCE(S):	BCC2017/1584541
MEMBER:	M. Edgoose
DATE:	12 November 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa: • cl.300.221 of Schedule 2 to the Regulations

Statement made on 12 November 2020 at 9:12am

CATCHWORDS

MIGRATION – Prospective Marriage (Temporary) (Class TO) visa – Subclass 300 (Prospective Marriage) – marriage within the visa period – genuine and continuing relationship – money transfers – sponsor’s short trips to Vietnam – family letters of support – regular communications – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65
Migration Regulations 1994, r 1.15; Schedule 2, cls 300.215, 300.216, 300.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the visa applicant a Prospective Marriage (Temporary) (Class TO) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 28 April 2017. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on 19 January 2018 on the basis that the visa applicant did not satisfy cl.300.215 and cl.300.216 of Schedule 2 to the Regulations because the delegates was not satisfied that the marriage would take place within the visa period and that the parties genuinely intend to live together as spouses.
4. The review applicant was represented in relation to the review by her registered migration agent.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

Do the parties genuinely intend to marry?

6. Clause 300.215 requires that at the time of application the parties have a genuine intention to marry, and that the marriage is intended to take place within the visa period. The applicant submitted to the Department a letter dated 28 November 2016 from Helen Nguyen, a civil marriage celebrant and a Statutory Declaration that stated the couple intended to marry on 1 December 2017 at Level 1, 4/86 John Street, Cabramatta NSW 2166. It was acknowledged that this Notice of Intended Marriage would remain valid for a period of 18 months, until 28 May 2018. Therefore, at the time of application the parties had a genuine intention to marry and satisfied the requirements of cl.300.215(a). The parties now intend to marry on 8 May 2021 at 29 Richardson Street, Fairfield, NSW 2165 according to the letter submitted to the Tribunal dated 25 October 2020. The proposed date for the marriage is within the visa period as required by cl.300.215(b). Therefore, the requirements of cl.300.215 are met.

Do the parties genuinely intend to live together?

7. Clause 300.216 requires that at the time of application 'the parties genuinely intend to live together as spouses'. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the Tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships: r.1.15A(4).

8. While it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations. Having regard to the considerations for a spousal relationship, and the degree to which these factors may be applied to determine a future intention, the Tribunal makes the following findings.

9. Financial aspects of the relationship

10. The Tribunal finds no evidence that the couple have committed to joint ownership of real estate or other major assets, or that they have assumed any joint liabilities. The Tribunal acknowledges that the sponsor sent money transfers to the applicant between 2016 and 2019 amounting to AUD6,050. The sponsor stated that AUD2,000 of the money transferred was for the applicant to purchase a television and motorbike. The Tribunal finds no evidence that either party owes any legal obligation in respect of the other. Given the constraints of residing in separate countries however, the Tribunal gives little weight to the consideration of the financial aspects of the relationship.

11. Nature of the household

12. On consideration of the limited evidence, the Tribunal therefore finds limited evidence of the sharing of responsibility for housework; and no evidence of joint responsibility for the care and support of children. The Tribunal acknowledges that the sponsor has made a number of short trips to Vietnam where the couple have spent limited time living together. The sponsor informed the Tribunal that when the relationship formally commenced in 2016, as a couple they cohabited at his parent's house for a period of time. Further to this the couple have cohabited for periods of 2 weeks in the years of 2017, 2018 and 2019 at the applicant's parent house when the sponsor has travelled to Vietnam. Given the constraints of residing in separate countries however, the Tribunal accords some weight to the consideration of the nature of the parties' household in this matter.

13. Social aspects of the relationship

14. The Tribunal acknowledges that the couple have represented themselves to other people during the limited time they have spent together in person as being a genuine couple and in a genuine relationship. The Tribunal acknowledges the affidavit letters of support dated November 2020, from the sponsor's children, sister and parents and the applicant's sister and parents. The couple submitted numerous photos of themselves together and with what appears to be family and friends during the sponsors visits to Vietnam. The Tribunal acknowledges that the couple communicate on a regular basis given their regular communication via telephone and various social media platforms. On the basis of the evidence, the Tribunal finds that the parties represent themselves to others as being in a genuine and continuing relationship, and that the couple plan and undertake joint social activities when logistically possible given that they live in separate countries. The Tribunal finds that the relationship is viewed as genuine and continuing in the opinion of the couple's family, friends and acquaintances.

15. Nature of the person's commitment to each other

16. The Tribunal is satisfied that the couple have known each other for approximately 10 years and that their relationship has continued to develop. The couple draw a degree of companionship and emotional support from each other having lived together for short periods of time, the evidence provided regarding regular telephone and social media contact between the couple and the numerous photos of the couple with their family and friends. The Tribunal is satisfied that the couple are in a genuine and continuing relationship.

17. On the basis of the above the Tribunal is satisfied that at the time of the visa application the parties genuinely intended to live together as spouses, and therefore cl.300.216 is met.

Do the parties continue to meet time of application requirements?

18. Clause 300.221 requires that at the time of decision, the visa applicant continues to satisfy the criteria in cl.300.211, 300.214, 300.215 and 300.216. That is, that visa applicant intends to marry an Australian citizen, permanent resident or eligible New Zealand citizen; that the parties have met and are known to each other personally; that the parties genuinely intend to marry and intend to do so during the visa period; and that the parties genuinely intend to live together as spouses. As stated earlier in this decision the parties now intend to marry on 8 May 2021 at 29 Richardson Street, Fairfield, NSW 2165 according to the letter submitted to the Tribunal dated 25 October 2020. The proposed date for the marriage is within the visa period as required by cl.300.215(b). Accordingly, cl.300.221 is met.
19. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 300 visa.

DECISION

20. The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:
- cl.300.221 of Schedule 2 to the Regulations

M. Edgoose
Member

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